FILED
AUG 10 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

No. . .73-.283

TULES ZAPATA
PETITIONER

VS.

THE STATE OF TEXAS,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas entered in the above and styled case, based on the Court's opinion dated April 25, 1973, and the Court's denial of Petitioner's leave to file a Motion for rehearing dated May 16, 1973.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the Court of Criminal Appeals are reported at Volume 493 S.W. 2d 801, and Numbered 45,782 on the docket of said

Court, handed down April 25, 1973 and are appended hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution
Fifth Amendment

". . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

UNITED STATES CONSTITUTION
Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation and to have the assistance of counsel for his defense."

United States Constitution
Fourteenth Amendment

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A certified copy of the testimony of two witnesses, Doctor William Gonzaba and Doctor Bernhard Landgrebe, accompanies this application.

The offense is murder with malice and the punishment assessed at forty-five years confinement.

On May 3, 1971, about ten o'clock p.m., police officers of the City of Seguin, Texas were dispatched to the Zapata residence in response to a call about a domestic quarrel. Petitioner threatened to kill her husband in the presence of two police officers. After talking to Petitioner and her husband, the officers left the residence.

At 11:30 p.m. different officers were dispatched to the same location in a response to a call concerning a shooting. Petitioner met the officers at the door, told them she had shot her husband, and handed them the pistol.

Petitioner filed no application for sanity hearing under the provisions of Article 46.02, V.A.C.C.P. After the State had rested, the defense called Doctor William Gonzaba to the witness stand. The Doctor's testimony is discussed in the Texas Court of Criminal Appeals opinion at 493 S.W. 2d 803. Because Petitioner does not feel that the Texas Court of Criminal Appeals fully discussed the doctor's testimony, a certified copy of his testimony accompanies this application.

Doctor William Gonzaba testified that he was the family doctor of Petitioner and that he had received a call at about 1:00 to 1:30 in the morning immediately following the shooting at which time the Petitioner seemed hysterical, nervous, and crying (SF 537). Doctor Gonzaba further stated that he had treated Petitioner for many years and three years prior to the incident in question, he had removed a tumor from her and that even prior to that occasion, Petitioner had

demonstrated severe emotional problems (SF 538, 539). The Doctor further stated that he felt that Petitioner might suffer a nervous breakdown at the time of the surgery (SF 538). He further stated in his opinion she should have seen a psychiatrist as far back as 1968 (SF 538). Doctor Gonzaba further stated that after the surgical procedure, he had placed Petitioner on medication, mainly anti-depressants, to relieve her depression which evidenced itself through crying spells (SF 539). The doctor further observed that as long as Petitioner took the medication he had prescribed, she had done well, but that she lost control of her emotions without the medication (SF 539). The Doctor further observed that her husband's drinking and abusiveness complicated her emotional problems (SF 542). The Doctor also testified that throughout the year of 1969, Petitioner continued on medication and apparently did well (SF 542). The Doctor also said that he treated her in 1969 and that he saw her approximately once a month during that year and throughout 1970 and 1971, and that Petitioner's condition had remained about the same (SF 542, 543). The Doctor testified that when Petitioner was hospitalized in May of 1971, she was very apprehensive, crying and giggling at the same time (SF 544). He further stated that she was withdrawn and that his physical examination was essentially negative except that he had found a bruise around the pit of the stomach, and the Doctor further observed bruises upon Petitioner's shoulders (SF 545). The Doctor observed that in May of 1971, Petitioner was hallucinating and that she kept seeing men trying to kill her. (SF 545, 546). According to the hospital records, the nurses had made observations that Petitioner was whimpering,

crying, staring out of the window, covering her eyes with her hands and laughing out loud (SF 551, 552).

The opinion of the Texas Court of Criminal Appeals does not discuss the testimony of Doctor Bernhard Landgrebe, a psychiatrist, which said testimony was adduced upon Motion of Petitioner at a hearing subsequent to the trial and prior to the certification of this case to the Texas Court of Criminal Appeals. Petitioner feels that Doctor Landgrebe's testimony is crucial to her position. Doctor Landgrebe testified as follows:

1. On September 6, 1971, Petitioner was very depressed and suicidal (SF 663);
2. His diagnosis was psychotic depression or so called involutional melancholia symptomized by depression, insomnia, loss of appetite, loss of energy, a feeling of worthlessness, a feel- of hopelessness and suicidal tendencies (SF 663).
3. His examination of the hospital records at Lutheran General Hospital where Petitioner was confined in 1968 suggested the same diagnosis as of that date (SF 664).
4. He had given Petitioner electro-shock therapy on four occasions (SF 667).
5. His prognosis was that Petitioner should continue electro-shock therapy along with antidepressant medication at the San Antonio State Hospital (SF 669);
6. His statement that homicidal tendencies are often exhibited as a symptom and there would

be periods of time when Petitioner would not know the difference between right from wrong (SF 672);

7. That it was within the realm of probability that Petitioner had delusions of persecution and that in such a stage of confused thinking and distorted reality homicide would be possible (SF 672).

8. That there would be times when Petitioner would be in such a state of confusion that she would have no conception of what was happening (SF 672).

9. At Page 673 at the Statement of Facts, Petitioner asks The Court to look at the following question and answer:

The Court:

"Doctor, I don't want to put you on the spot too much, but Miss Jandt touched it a little bit. You are not saying that she is legally insane?"

The Witness:

"With this diagnosis, you know I would think she insane, Yes."

As a result of the above mentioned hearing subsequent to the trial, the Court entered an order requiring the sheriff to deliver Petitioner to the San Antonio State Hospital for an evaluation of her mental condition. The order recites that reasonable grounds existed for an evaluation of Petitioner's condition (Tr 38). A certified copy of this order accompanies this petition.

Without any further hearing, the Court on May 22, 1972, certified Petitioner's case to the Texas Court

of Criminal Appeals for Appellant review (Tr 43). A certified copy of this order accompanies this petition.

ISSUES PRESENTED

I.

THAT THE COURT'S REFUSAL TO CONDUCT A SEPARATE COMPETENCY HEARING DURING THE TRIAL OR SUBSEQUENT TO THE TRIAL VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE HOLDING OF THIS COURT IN PATE VS. ROBINSON 1966, 383 U.S. 375; 86 S. CT. 836, 15 L. ED. 2D 815.

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PETITIONER'S APPEAL

ISSUE I (RESTATED)

THAT THE COURT'S REFUSAL TO CONDUCT A SEPARATE COMPETENCY HEARING DURING

THE TRIAL OR SUBSEQUENT TO THE TRIAL VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE HOLDING OF THIS COURT IN PATE VS. ROBINSON 1966, 383 U.S. 375; 86 S. CT. 836, 15 L. ED. 2D 815.

ARGUMENT

In the Texas Court of Criminal Appeals Petitioner presented issues basically as are here above stated. The Texas Court of Criminal Appeals took the position that Petitioner by announcing ready for trial and testifying in her own behalf without having filed a motion or a separate competency hearing waived her right to the hearing. Article 46.02 V.A.C.C.P. provides for procedures in the event for this type of situation. The Texas Court of Criminal Appeals in the instant case took the position that the trial was not required to conduct a hearing on his own motion unless significant facts were brought to his attention which indicated a need for separate determination. The Court then went on to hold that Doctor Gonzaba's testimony did not give rise to an issue of petitioners competent to stand trial.

Petitioner takes the position that the trial Court committed error of constitutional dimension in not impaneling a jury to determine Petitioner's competency to stand trial based on Doctor Gonzaba's testimony.

Petitioner further contends that the Court committed error of constitutional dimension in not impaneling a jury to determine Petitioner's competency

after the hearing subsequent to the trial at which time Doctor Landgrebe testified.

Petitioner relies heavily upon this Court's opinion in **Pate vs. Robinson** (1966) 383 U.S. 375; 86 S. Ct. 836, 15 L. Ed. 2d 815.

The defense presented two uncontroverted medical witnesses whose testimony leaves no other conclusion possible, other than the incompetency of this Petitioner.

Article 34 V.A.P.C. provides:

> "No act done in a state of insanity can be punished as an offense. No person who becomes insane after he committed an offense shall be tried for same while in such condition. No person who becomes insane after he is found guilty shall be punished while in such condition."

Petitioner contends there can be no waiver of the matter of competency in view of the opinion of Mr. Justice Clark in **Pate** (supra) wherein it is stated at 86 S. Ct. 841:

> "The state insists that Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois Law. But it is contradictory to allow that a defendant may be incompetent and yet knowingly and deliberately 'waive' his right to have the Court determine his incapacity to stand trial. **Taylor vs. U.S.** 282 F. 2d 16, 23."

Mr. Justice Clark's opinion further states at 86 S. Ct. 842 "while Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it

cannot be relied upon to dispense with a hearing on that very issue."

The doctrine of **Pate** has been adopted by the Texas Court of Criminal Appeals in **Townsend vs. State** 427 S.W. 2d 55; **Morales vs. State** 427 S.W. 2d 51; **McCarter vs. State** 438 S.W. 2d 575; **Vardas vs. State** 488 S.W. 2d 468; **ExParte Slayton** 484 S.W. 2d 102.

In **Townsend vs. State** (supra) the Court said:

> "The manner in which a necessity for an inquiry concerning an accused's present insanity or competency is raised by the defense before or during the trial is not of much importance. If the trial judge learns from personal observations, or facts known to him, or from evidence presented, or by motion of the accused or his counsel, or by affidavit, or from any reasonable claim or credible source that there is a bona fide doubt as to the accused's condition to comprehend his situation or make the defense, a duty devolves upon the trial judge to cause a sanity hearing on that issue to be held as provided by law."

In **Morales vs. State** (supra) Judge Onion said at Page 54:

> "As we indicated in **Townsend vs. State** (supra) Pate would require the trial judge, when evidence as to the accused's competency becomes sufficiently manifest during the trial, to halt the proceedings, conduct a h e a r i n g on his own initiative and obtain finding by the trial jury on the issue before proceeding further. While Pate did not require a jury finding, Texas Law did."

In **Morales vs. State** (supra) Judge Onion said at Page 54:

> "We do not consider that due process requirements have been met by waiting to submit the issue of competency to stand trial to the jury along with the issue of guilt or innocence. Deciding whether a man was sane enough to stand trial after you have tried him is obviously unfair to him and the public. CF. **Ramirez vs. State** 92 Tex. Cr R. 235, 241 S.W. 1020; **Rice vs. State** 135 Tex. Cr R. 390, 120 S.W. 2d 588."

It is well settled that the conviction of an accused person while he is legally incompetent violates due process, **Bishop vs. U.S.** 350 U.S. 961, 76 S. Ct. 440, 100 L.Ed. 835 (1956). The Texas Court of Criminal Appeals held that Petitioner intelligently waived this issue by her failure to request a hearing on her competence before the trial; and further, that on the basis of the evidence before the trial judge no duty rested upon him to order a hearing sua sponte.

The standard that has been applied by the Federal Courts appears to require a trial judge to conduct an inquiry as to competency and sanity where there appears to be a reasonable doubt as to a person's competency or sanity. **Kibert vs. Peyton** 383 F 2d 566 (4th Cir. 1967); **Rhay vs. White** 385 F 2d 833 (9th Cir. 1967); **Welch vs. Beto** 355 F 2d 1016 (5th Cir. 1966); **Moore vs. U.S.** 464 F 2d 663 (9th Cir. 1972); **Brizendine vs. Swenson** 302 F. Supp 1011 (1969).

The Diagnostic and Statistical Manual of Mental Disorders, 2d Ed. (1968) written by the Committee on Nomenclature and Statistics of the American Psychiatric Association classified involutional melancholia as an affective psychoses.

41 Am Jur 2d 542 furnishes the following definitions:

DELUSION:

"A belief that something exists which does not exist and which a rational person in the absence of further proof would not accept for belief. It is based on a concept for which there is no reasonable foundation and which is ordinarily incredible to a sane person. All delusions which show or tend to show insanity are insane delusions on the theory that insanity is a disease of the mind and delusions a symptom of the disease, but it is incorrect to maintain that all delusions are indicative of insanity."

HALLUCINATIONS:

"A morbid error in one or more of the senses, or a perception of objects which do not in fact make any impression on the external senses. The perception arises not from an impulse received from without but from a maladjustment within the perceptive apparatus itself. The basic distinction between hallucinations and delusions is that the former refers to false perception of objects while delusions are concerned with false ideas or beliefs."

Petitioner contends that the record in this case reflects uncontradicted testimony of two qualified medical doctors reflecting many symptoms of psychotic proportion. It is generally conceded that a psychosis is a mental disorder that is sufficient to come within any of the generally accepted tests for insanity and competency recognized by American Courts, both State and Federal. It is seriously asked that this Honorable Court decide the instant case strictly upon the basis of Pate (supra). The Court is further asked to

consider the following definition in this connection:

> "A person is deemed to be phychotic when his mental functioning is sufficiently impaired to interfere grossly with his capacity to meet the ordinary demands of life. The impairment may result from a serious distortion in his capacity to recognize reality. Hallucinations and delusions may distort his perception. Alterations of mood ..... that his capacity to respond appropriately is grossly impaired. Deficits in perception, language and memory may be so severe that his capacity for mental grasp of his situation is effectively lost. **Diagnostic and Statistical Manual of Mental Disorders** (1968), p.22."

A further examination of the medical literature on the subject of involutional melancholia can be found in the American Journal of Psychiatry Volume 124, 11 Supp. p.21; Archives of General Psychiatry Volume 19 p.2 (July 1968); American Handbook of Psychiatry Volume 1 p.540, 543, (1959); The Archives of General Psychiatry Volume 27 p.397 (September 1972).

Petitioner would respectfully contend that she could not intelligently waive any constitutional right to a separate competency hearing, particularly in view of the holdings of this Honorable Court in **Henry vs. Mississippi** 379 U.S. 443, 85 S. Ct. 564; 13 L.Ed 2d 408. It is contended in Petitioner's behalf that the State of Texas cannot absolutely require a filing of a preliminary motion or a competency hearing, as was recognized by Judge O n i o n in his opinions in the **Townsend** (supra) and **Morales** (supra) cases.

ISSUE II RESTATED

THE COURT'S REFUSAL TO STRIKE DOWN THE INDICTMENT HEREIN VIOLATES THE PRO-

VISIONS OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT SAID INDICTMENT IS NOT SUFFICIENTLY CLEAR TO INFORM THE ACCUSED OF THE OFFENSE CHARGED WITH PRECISION AND CLARITY, AND IS NOT POSITIVE ENOUGH TO SUPPORT A PLEA OF PRIOR JEOPARDY AFTER TRIAL AND IS HENCE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

ARGUMENT

The State of Texas has since 1861 taken the position that the word "did" is indispensable in the charging of an offense. The cases relied upon by Petitioner are extensively discussed in the dissenting opinions by Judge Onion in which he is joined by Judge Roberts. As the dissenting opinion points out, the cases relied on were cited with approval as late as 1971, by the Texas Court of Criminal Appeals. The dissenting opinion relies upon 1 Branch's Ann. P.C., 2d., ed., Sec. 512, p.495; 30 Tex. Jur. 2d **Indictment and Information** § 22, p. 571-572 and 4 Wharton's Criminal Law and Procedure § 1761, p.555 (1957).

Petitioner's real quandary in the instant case is illustrated by the fact that her trial Counsel filed a motion to quash the indictment which specifically alleged the Texas decisions holding that the indictment was fatally defective. Obviously, this was done because of the Texas Law at the time this case was tried. Petitioner found herself in the unique position of not being able to successfully plead prior conviction or prior acquittal because of the invalidity of the indictment. The State in the event that an unsatisfactory sentence

was assessed against Petitioner could have tried her again taking the position that no jeopardy had attached because of the invalidity of the indictment, and argued the same cases Petitioner unsuccessfully argued before the Texas Court of Criminal Appeals to support the State's position.

It is basic constitutional law that the accused must be informed of the nature of the cause of the accusation and every material fact and essential element of the offense charged be done so with precision and certainty in the indictment. **U.S. vs. Hess,** 124 US 482, 31 L.Ed. 516, 8 S Ct. 571; **United States vs. Britton** 107 US 655, 27 L.Ed. 520, 2 S Ct. 512.

The Texas law prior to the instant decision required that the word "did" appear in the indictment, at some place, since otherwise, there would be no allegation of a crime. This was the law as far as felonies and misdemeanors were concerned. **Edmondson vs. State** 41 Tex 495 (1874) (murder prosecution) and **Barfield vs. State** 45 S.W. 1015 (1898) (Unlawfully carrying a pistol). This line of authorities was again approved in **Mesa vs. State** 462 S.W. 2d 600 (1971).

It is also basic law that the accused, in a criminal prosecution, has a substantive right to be informed in simple and understandable language of the crime he is charged with and the acts constituting the crime, in sufficient detail to prepare his offense and to be protected in the event of double jeopardy. **Wong Tai vs. United States** 273 US 77, 71 L.Ed. 545, 47 S Ct. 300; **United States vs. Debrow,** 346 US 374, 98 L.Ed. 92, 74 S Ct. 113. Petitioner is doubly confused as to whether or not the offense herein is actually

charged in plain and intelligible language because both the majority and the dissenting opinions quote Judge Onion's holding in **Moore vs. State** 473 S.W. 2d 523 (1971) wherein Judge Onion said:

> "It is, of course, not sufficient to say that the accused knew with what offense he was charged, but the inquiry must be whether the charge in writing furnished that information in plain and intelligible language."

It would seem that the Texas Court of Criminal Appeals finds itself in some disagreement as to the interpretation of Judge Onion's previous opinion. Petitioner would respectfully submit and contend that Judge Onion is the best qualified to interpret his own opinion as he states his conclusion in Petitioner's case that the indictment does not charge the offense in plain and intelligible language. Petitioner further contends that the due process clause of the Fourteenth Amendment to the United States Constitution requires the adoption of Judge Onion's dissent in this case in order to adequately protect Petitioner's right to be informed of the nature and cause of the accusation as guaranteed by the Sixth Amendment to the United States Constitution and the right to plead jeopardy as guaranteed by the Fifth Amendment to the United States Constitution.

REASON FOR GRANTING WRIT

A reading of the record in this case makes it quite clear that the Texas Court of Criminal Appeals has disregarded the mandate of this Court in **Pate vs. Robinson** (supra) and has gone further and abolished a rule of certainty concerning indictments when due

process would require a definite rule instead of confusion.

It further becomes necessary for this Petitioner to request this Honorable Court to grant her any relief that the Court may feel she is entitled to receive.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, HARRY A. NASS, JR., a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 9th day of August, 1973, I served a copy of the foregoing Writ of Certiorari on the Respondent by depositing same in the United States Post Office with postage prepaid addressed to the following counsel of record at his post office address, to-wit: Honorable John L. Hill, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas.

Harry A. Nass, Jr.

APPENDIX A

TULES ZAPATA, Appellant
NO. 45,782, vs.
THE STATE OF TEXAS, Appellee
Appeal From Guadalupe County

OPINION

This is an appeal from a conviction for murder with malice. Punishment was assessed by the jury at forty-five years.

The sufficiency of the evidence is not challenged. A summary of the facts is set out for a better understanding of the grounds of error presented.

On the evening of May 3, 1971, Kathryn Soefje, a dispatcher for the Seguin police department, received a call at approximately 10:00 p.m. from one of appellant's children saying that there was a domestic quarrel at the family residence. Officers Layne Dietz and Mike Rosas were dispatched to investigate the call. Both officers testified that appellant threatened to kill her husband in their presence. After calming the two, the officers left.

At approximately 11:30 p.m. the same evening, Officers Roy Paez and Kenneth Strong were summoned to the Zapata residence to investigate an alleged shooting. Upon their arrival at the home they were met by the appellant. She told the officers that she had shot her husband, and then she handed them a pistol.

Initially, the appellant contends that the trial court erred in failing to conduct a separate hearing on her present competency to stand trial. She argues that the uncontroverted testimony of Dr. Gonzaba raised

sufficient question as to her incompetency for a period of three years prior to this offense.

No motion for a preliminary hearing on the issue of competency to stand trial under the provisions of Article 46.02, V.A.C.C.P., was filed. In fact, appellant's counsel announced ready and the appellant personally entered her own plea. Counsel then announced that the appellant did not deny shooting her husband and stated that she did it in self-defense. During the trial and after the State had rested, appellant called Dr. William Gonzaba as a witness. He testified that appellant had suffered from **hallucinations and various other symptoms of depression prior to and immediately after the shooting occurred.** Nowhere does it appear that he considered appellant incompetent to stand trial nor that she was unable to distinguish right from wrong. In fact, at the trial appellant, testifying in her own behalf, gave no indication that she was mentally incompetent. She answered all questions fully and completely with the assistance of an interpreter. Nor is there anything in the record to indicate that appellant's counsel ever requested that she be examined by a psychiatrist. Further, there is no request by appellant's counsel for a competency hearing during the trial.

Appellant, by announcing that she was ready and entering her plea without any suggestion of insanity to the court, waived her right to a separate hearing before the trial. A trial judge is not required to conduct such a hearing on his own motion absent any significant facts being brought to his attention or absent circumstances and actions which should have indicated a need for a separate determination. Boss vs. State, 489 S.W.2d 580. We hold that the testimony

of Dr. Gonzaba did not give rise to an issue of appellant's competency to stand trial, especially when analyzed in comparison with appellant's own actions and testimony during the trial.

Next, appellant alleges that the trial court erred in refusing to grant her motion to quash the indictment. She argues that the failure to use the word "did" in the charging portion of the indictment is fatal. It is her contention that such omission is in violation of Articles 21.02(7), 21.03 and 21.04, V.A.C.C.P.

The indictment appears in the record as follows:

> "The Grand Jurors for the County of Guadalupe, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the May Term, A.D. 1971, of the 25th Judicial District Court of said County, upon their oaths present in and to said Court, that Mrs. Tules Zapata, on or about the 3rd day of May, A.D. 1971, and before the presentment of this indictment, in said County and State, then and there unlawfully, with malice aforethought, kill Luis Zapata by shooting him with a gun, against the peace and dignity of the State."

Appellant, relying on Mesa vs. State, 462 S.W.2d 600, argues that the word "did" is an essential word in the indictment. It is her position that the word "did" must appear just prior to ". . . then and there unlawfully," or before ". . . kill Luis Zapata," in order that the indictment contain everything that is necessary to be proved with the required degree of certainty.

The real issue is whether the indictment sets out the offense charged in plain and intelligible language. We are mindful of our holding in Moore vs. State,

473 S.W.2d 523 (1971), where Presiding Judge Onion, speaking for the majority, said:

> "It is, of course, not sufficient to say that the accused knew with what offense he was charged, but the inquiry must be whether the charge in writing furnished that information in plain and intelligible language."

Before analyzing the language of the indictment in the present case, it is necessary that we look at the definition of "malice aforethought." The legal definition of such, as defined by the Court, is "the voluntary and intentional doing of an unlawful act by one of sound memory and discretion with the purpose, means, and ability to accomplish the reasonable and probable consequences of the act." **Witty vs. State, 171 S.W. 229 (1915).** Now a careful reading of the charging portion of the indictment shows "that Mrs. Tules Zapata, on or about the 3rd day of May, A.D. 1971, and before the presentment of this indictment, in said County and State, **then and there unlawfully, with malice aforethought, kill Luis Zapata by shooting him with a gun."** (Emphasis Supplied).

Considering the definition of malice aforethought in connection with the indictment, we hold that the indictment sets forth the offense in plain and intelligible words as required under the provisions of Article 21.02(7), V.A.C.C.P. The insertion of "did" in one of the two places or both would make the charging portion read smoother and more grammatically correct. To the extent that other cases are in conflict with this holding, they are overruled. See Edmondson vs. State, 41 Tex. 496.

Also, the appellant claims that the indictment

should have been quashed because Mexican Americans were systematically excluded from grand juries in Guadalupe County. She relies on the grand jury list for the years 1967 through 1971. Those lists show that twelve percent of the grand jurors, during those years, had Mexican American names. Counsel for appellant argues that since Guadalupe County has approximately a fifty percent Spanish surname population, such percentage should reflect in the make-up of the grand juries. What appellant has failed to show is how many females with Spanish surnames may have married other than Spanish surname males and served on such juries. Nor does her evidence reflect how many Spanish surname persons were summoned for such duty and requested to be excused because of job requirements or health reasons. Also, we note from the record that three Mexican Americans served on the grand jury which indicted appellant. We perceive no harm to appellant. See Ex parte Woods, 483 S.W.2d 464, and Jaquez vs. State, 473 S.W.2d 530.

The appellant next contends that the prosecutor suppressed evidence. She argues that the trial court erred in refusing to grant her motion for discovery of a tape recording taken at the grand jury proceedings. She argues that the contents of that recording would show that the prosecutor had information concerning a knife allegedly found on the deceased body, such information being vital to the issue of self-defense.

The record shows that in the hearing on his motion, appellant called Officers Paez and Strong as witnesses. Both officers denied the existence of such a knife. Also, the district attorney denied that he had any knowledge of a knife being found on the deceased. The trial judge called for the inventory of deceased's

clothing and personal items taken from his body. It did not reflect the existence of a knife. After the trial judge denied the motion for discovery, he instructed the district attorney to bring him the tape recording and he would listen to it. If the recording produced any information about a knife, he said that he would change his previous denial. Nothing further is shown. Appellant has not shown any harm.

Lastly, appellant contends that even if she is not entitled to hear the tape recording of the testimony before the grand jury, the tape recording itself violated the provisions of Article 20.02, V.A.C.C.P. Even if such were a violation, it would not require a reversal of this cause.

No reversible error being shown, the judgment is affirmed.

Douglas, Judge

(Delivered April 25, 1973)

TULES ZAPATA, Appellant
NO. 45,782 VS.
THE STATE OF TEXAS, Appellee
Appeal From Guadalupe County

DISSENTING OPINION

The majority holds that the word "did" is no longer an essential word in an indictment alleging murder with malice aforethought when charging the acts which constituted the crime involved. The majority appears to conclude the word may be supplied by argument or intendment, and is necessary only if the pleader wants to be "more grammatically correct." In so holding, the majority expressly overrules Edmondson vs. State, 41 Tex. 496 (1874), and other cases in conflict, thereby abrogating a general rule of pleading in criminal cases that has existed in this jurisdiction for over one hundred years.

In support of his contention that the indictment was fatally defective, the appellant relies upon Article 21.02(7), Vernon's Ann.C.C.P. (requisites), which requires that the "offense must be set forth in plain and intelligible language," and upon Articles 21.03 and 21.04, Vernon's Ann.C.C.P. These articles respectively read, as follows:

> "Everything should be stated in an indictment which is necessary to be proved."

And

> "The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense."

It has long been established that it must be alleged in plain and intelligible words that the accused did

things which constituted the offense. See Article 21.02, supra, note 37, and authorities there cited. And, "[f]acts must be alleged by direct, certain, and positive averments, and not by way of argument and inference." 1 Branch's Ann.P.C., 2d ed., § 513, p. 495-496.

In Hutchinson vs. State, 26 Tex. 111 (1861) (concerning a prosecution for unlawfully killing an animal coming within the meaning of an estray), the court said:

> " . . . The omission of so important a word (did), a word indispensable to make sense, in charging the offense, ought not to be supplied by intendment."

State vs. Daugherty, 30 Tex. 360 (1867) (unlawful interference with private property or private rights), held that where an indictment omits a material word, although it be but a preposition or a helping verb, the court will not, from a knowledge of the language, supply the missing word so as to supply the probable intention of the grand jury. The court, thus, sustained a judgment quashing an indictment on the basis of the omission of the word "did", the State then having the right to appeal.

And, in Edmondson vs. State, 41 Tex. 496 (1874) (a murder prosecution), where the offense was alleged to have been done with "express malice aforethought," the court said:

> " . . . [T]he averment, as to injuries inflicted with a stick, not only lacks the proper specification of time and place, but omits the word 'did' in a connection where it was material — an omission which has been repeatedly held good ground for quashing an indictment."

In 1876, the Court of Appeals in Ewing vs. State, 1 Tex. App. 362 (1876) (a prosecution for abortion), cited with approval the foregoing cases, and said:

> "The indictment in this case is fatally defective because it fails to allege that the defendant 'did' the acts charged as constituting the crime. This word is indispensable, and cannot be supplied by intendment."

To the same effect are the holdings in Tompkins vs. State, 4 Tex. App. 161 (1878) (keeping a disorderly house for the purpose of public prostitution), and Moore vs. State, 7 Tex. App. 42 (1879). And Walker vs. State, 9 Tex. App. 177 (1880), noted that the omission of the word "did" in the pleadings had been "uniformly adjudged substantial."

In Jester vs. State, 9 S.W. 616 (Tex.Cr.App. 1888) (involving a burglary prosecution), the Court of Appeals said:

> ". . . In the indictment, as it appears in the record, there is a fatal defect, in so far as it undertakes to charge burglary. It alleges that the defendant 'then and there, by force, break and enter a house,' etc; omitting the essential word 'did'. If such omission be in the original indictment, a conviction for said offense cannot be sustained upon it. Moore vs. State, 7 Tex. App. 42; Velesco vs. State, 9 Tex. App. 77 . . . ."

In Barfield vs. State, 45 S.W. 1015 (Tex.Cr.App. 1898) (a prosecution for unlawfully carrying a pistol), it was noted that the omission of the word "did" in charging the acts committed, in an unbroken line of decisions, has been held to invalidate the complaint, information or indictment as the case may be. A reversal was ordered.

This court in Ivey v. State, 247 S.W.2d 105 (Tex. Cr.App.) (preventing another from engaging in a lawful vocation), recognized the general rule involved but held the words "in doing so" to be sufficient in the indictment.

And, as late as 1971, this court in Mesa vs. State, 462 S.W.2d 600 (Tex.Cr.App. 1971), stated:

> "It is true that ' [t]he word "did" is an essential word in indictments, informations and complaints, where the acts which constitute the offense are being set forth.' 1 Branch's Ann. P.C., 2d ed., Sec. 512, p. 495 and cases there cited. Further, '[i]f the word omitted is essential to the certainty necessary in the description of the offense it cannot be supplied by intendment, and of consequence such omission is fatal to the validity of the indictment.' Id."[1]

See also 30 Tex.Jur.2d **Indictment and Information** § 22, p. 571-572 and 4 Wharton's Criminal Law & Procedure § 1761, p. 555 (1957).

In the instant case, the appellant, prior to trial, made a written motion to quash the indictment on the very ground now urged on appeal citing cases in support of the general rule discussed. The motion was overruled.

It is difficult to imagine that, when the indictment was so challenged, the prosecutor did not seek a new one eliminating the question from the case. See Barfield v. State, supra; Mesa v. State, supra. He did not, and now the majority, in order to affirm the conviction, abolishes the general rule which has prevailed

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1 In **Mesa**, supra, an aggravated assault case, the court held that the failure to use the word "did" for a third time in the pleading was not reversible error under the circumstances.

for so long without establishing another. The majority does not make clear whether this holding will apply only to murder with malice cases or will have application to all cases where malice aforethought is not alleged, or whether there is one rule for murder cases and another for other cases.

I cannot agree to such action. In my opinion, the omission of the word "did" was fatal for the offense was not charged in plain and intelligible language. As this court said in Moore vs. State, 473 S.W.2d 523 (Tex.Cr.App. 1971),

> "It is, of course, not sufficient to say that the accused knew with what offense he was charged, but the inquiry must be whether the charge in writing furnished that information in plain and intelligible language . . ."

I dissent.

Onion, Presiding Judge

(Delivered April 25, 1973)

Roberts, J., joins in this dissent.

APPENDIX B

No. 73-283

Supreme Court of The United States

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS OF TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 45,782 styled:

Tules Zapata, Appellant

vs.

State of Texas, Appellee

judgment of 25th Judicial District Court of Guadalupe County, Texas, was affirmed on April 25, 1973 Appellant's Motion for Leave to File Motion for Rehearing denied on May 16, 1973 and on May 18, 1973 mandate issued.

THEREFORE, with the denying of Appellant's Motion for Permission to file Motion for Rehearing, this cause was disposed of by this Court on May 16, 1973, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of said Court, at office, in Austin, Texas, this the 30th day of May A.D. 1973.

(Seal)

Glenn Haynes

GLENN HAYNES, CLERK
COURT OF CRIMINAL APPEALS
OF TEXAS

Received August 10, 1973
Office of the Clerk, Supreme Court, U.S.